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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 313

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

INTERNATIONAL RICE MILLING COMPANY, INC., ET AL.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITION FOR REHEARING ON BEHALF OF INTERNATIONAL RICE MILLING COMPANY, ET AL.

BALDWIN, HASPEL & MOLONY;
LAWRENCE A. MOLONY,
CONRAD MEYER, III.
KAUFMAN, ANDERSON & LEITHEAD;
ELIAS R. KAUFMAN.
MONROE & LEMANN;
NICHOLAS CALLAN.

HAUSER PRINTING CO., INC., NEW ORLEANS

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International Rice Milling Co., Inc., et al., Respondents in the above entitled matter, and Petitioners herein, respectfully petition this Honorable Court for a rehearing of the cause.

In accordance with Rule 33 of the Court, as amended, Petitioners request this rehearing for the reason that there are substantial grounds to influence and affect the

decision of the Court which have not been previously presented.

Petitioners call to the attention of the Court the fact that in the opinion rendered herein by Mr. Justice Burton, dated June 4, 1951, the Court decided this case on the basis that the activity of the Union was not directed to inducing and encouraging a **concerted** refusal by the employees of the Sales House to transport or otherwise handle goods and materials of Petitioners. As expressly stated in the Court's opinion, in disposing of the case:

> "A sufficient answer to this claimed violation of the section is that the Union's picketing and its encouragement of the men on the truck did not amount to such an inducement or encouragement to **'concerted'** activity as the section proscribes." (Emphasis added.)

Petitioners further call to the attention of the Court that the meaning of the word "concerted" upon which the Court bases its decision, was not discussed in a single sentence in the briefs filed in this matter, either by Petitioners or by the National Labor Relations Board, nor was any oral argument submitted on this point.

Thus, for the reason that the Court's opinion is based upon a legal argument which was never in the contemplation of the parties to the proceeding, Petitioners respectfully and earnestly request that a rehearing be granted in this matter in order to present the matter adequately to the Court.

In support of this Petition for Rehearing and to suggest to the Court that its opinion and decision is in error, Petitioners submit the following arguments and authorities:

The Attempt to Induce the Employees of the Sales House Not to Cross the Picket Line was an Attempt to Induce "Concerted" Action on their Part.

In the first place, attention of the Court is called to the fact that the inducement and encouragement of the employees of the Sales House was merely one incident in a series of incidents involving "secondary boycotts" in a labor dispute which occurred in the rice milling area of the State of Louisiana during the months of September and October 1947. The official Transcript in this Court, and the opinion of the Court below, will show in full the over-all plan of the Union to stop effectively all trading and commerce between the outside business world and the six rice-milling companies involved in this case. The opinion of the Trial Examiner, found in pages 56-85 of the Transcript, shows clearly the plan of the Union to achieve "concerted" refusal by the employees of any and all employers, doing business with the rice mills, to handle the commodities of the rice mills. Thus, it is submitted that on the overall facts of the case there is evidenced the intention of the Union to achieve this "concerted" activity.

Secondly, we call to the Court's attention the exact language of the pickets when they stopped and stoned the two employees of the Sales House, which is the particular incident before the Court. As found in the Transcript, page 69, the pickets told the driver of the truck and his helper:

"Don't let nobody else drive your truck."

Any person familiar with the tactics of labor organizations on strike, knowing the facts of this particular incident, and hearing the language to these two employees of the Sales House ordering them not to permit

their trucks to be used by anyone else to enter the struck plant, would unhesitatingly say that this statement, quoted above, was intended to be a threat to all the other employees of the Sales House, and further, that the pickets intended that this particular driver and his helper should carry that threat back to their fellow employees. This intent on the part of the pickets is so commonly found in many labor disputes that it could not properly be said as a pure matter of fact that the pickets were not seeking "concerted" action on the part of all of the employees of the Sales House.

The Right of an Individual to Refuse to Cross a Picket Line is a "Concerted" Activity, as that Term is Used in the National Labor Relations Act.

In addition to the fact that the pickets were attempting to induce concerted action by the employees of the Sales House, we also call to the Court's attention several decisions by the Board itself in which it has held that the right of an individual to refuse to cross a picket line is a "concerted activity" which is protected by the National Labor Relations Act, and further, that an employer who disciplines an employee who refuses to cross a picket line has thereby committed an unfair labor practice. The term "concerted" appears at least twice in the National Labor Relations Act, once in Section 8(b)(4), and also in Section 7. Section 7 reads in part:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations to bargain collectively . . . and to engage in other **concerted** activities . . ." (Emphasis added).

It is submitted that the term "concerted" as used in Section 7 must have the identical meaning as the term "concerted" in Section 8(b)(4). We have not been able to find any reported decisions of the Courts or the Board which deal with the meaning of the word "concerted" as found in Section 8(b)(4), prior to the decision in the instant case. However, there are numerous decisions of the Board which have treated the term "concerted" as found in Section 7 of the Act.

We particularly call to the attention of the Court the decision of the Board itself in *Cyril de Cordova & Bro.*, 91 N. L. R. B. No. 187 (October 1950). In that case a **single** employee refused to cross the picket line of a union established around the business location of another employer. The Board found that this individual employee was discriminatorily discharged for his refusal to cross the picket line, and **held** that by such discharge his employer violated Section 8(a)(3) of the Act, for the reason that the right to refuse to cross a picket line is a **concerted** activity of this employee which is protected by Section 7 of the Act. Other cases which sustain the right of individual employees to refuse to cross a picket line are:

Montag Bros. Inc., 51 N. L. R. B. 366 (1943);
Illinois Bell Telephone Co., 88 N. L. R. B. No. 191 (1950);
New York Telephone Co., 89 N. L. R. B. No. 45 (1950);
Cinch Mfg. Corp., 91 N. L. R. B. No. 63 (1950);
See *United Biscuit Company of America*, 38 N. L. B. R. 778 (1942).

In the *Cyril de Cordova* case, the single employee who refused to cross the picket line, a man named Finn, was ordered reinstated by the Board because his refusal

was a **concerted** activity. We quote part of the Board's decision in that case:

> "Unlike the situation in the 'partial strike' cases referred to above, Finn's refusal to perform part of his work was not a wilfully contrived violation of plant discipline as a means to an end. It was rather a necessary and unavoidable incidental effect of **a form of concerted action undertaken in a conventional and traditional manner.**" (Emphasis added).

Contrast the above language of the Board with the following language of the opinion of the Court in the instant case:

> "A Union's inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business **generally are not aimed at concerted, . . . conduct by such employees.**" (Emphasis added).

We submit that it is impossible to reconcile the opinion of this Court in the instant case and the opinion of the Board in the last quoted case as to the theory of whether the refusal to cross a picket line is a **concerted** activity or not. On this point alone, we submit that the Court should have this matter reargued so that not only Counsel for Petitioners, but also Counsel for the Board, may submit to the Court their theories and arguments as to what is a "concerted" activity or refusal.

The Number of Employees Involved in the "Activity" Does Not Control the Determination of Whether Their Action is "Concerted" Or Not.

There is an implication in the opinion of the Court in the instant case that the stopping and stoning of the

two employees of the Sales House did not constitute an effort to induce or encourage "concerted" action because there were only two individuals involved.

As shown in the *Cyril de Cordova* case, *supra*, the Board held that the action of **one** employee, amounted to "concerted" activity. We also call to the attention of this Court the decision of the Board in *Central Steel Tube Co.*, 48 N. L. R. B. 604, 612-613 (1943), affirmed in 139 F. 2d 489, in which the Board held that the action of a **single** employee in merely **attempting** to have other employees join with him in a petition for a wage increase was a "concerted and collective" activity.

We also call to the attention of the Court the many decisions by the Board in which the Board has held that the discriminatory discharge of a **single** employee has had the effect of **discouraging** the concerted activities of his fellow employees, and is therefore unlawful. An examination of Volume 88 of the decisions of the National Labor Relations Board (the volume most recently bound) discloses that in the three-month period from January 1, 1950 to March 1, 1950, the Board held no less than **four** times that discrimination directed to a **single** employee discouraged the "concerted" actions of other employees. *Nu-Car Carriers, Inc.*, 88 N. L. R. B. 75 (1950); *Weisfields, Inc.*, 88 N. L. R. B. 545 (1950); *Tennessee Knitting Mills, Inc.*, 88 N. L. R. B. 1103 (1950); *Premier-Southern Ticket Company, Inc.*, 88 N. L. R. B. 1129 (1950). If time permitted a fuller research, we estimate that there would be literally hundreds of decisions of the Board to substantiate this determination.

If action directed by an employer to a single employee is held to **discourage** concerted activities, the

application of that law to the facts of the instant case requires the Court to find, both as a determination of fact and one of law, that the actions of the labor organization in the instant case, directed to the two employees of the Sales House, were attempts to induce and encourage concerted activity by the employees of the Sales House.

Section 13 of the Act Cannot Assist the Court in the Decision of this Case.

The opinion of this Court in the instant case, although based upon the Court's interpretation of the word "concerted", also infers that Section 13 of the Act substantiates the instant result. Section 13 of the Act reads as follows:

> "Nothing in this Act, **except as specifically provided for herein,** shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right". (Emphasis added.)

The above quoted portion of the Act states a general proposition that nothing in the Act shall impede the right to strike. However, the same sentence which declares this general rule makes the express exception of "except as specifically provided for herein". Petitioners submit that their case falls squarely under the language of Section 8(b)(4)(A) and (B), and that for this reason the right to strike in the instant case has been specifically impeded and diminished.

To decide the instant case upon the strength of Section 13 of the Act, by holding that this section can be used to limit Section 8 of the Act, is to ignore the

plain language of Section 13 . . . "except as specifically provided for herein". We submit that this proposition is completely self-evident.

CONCLUSION

For the reasons set forth herein, Petitioners earnestly and respectfully request that a rehearing be granted in this matter so that they may have the opportunity to assist the Court in its decision by their arguments and authorities regarding the meaning of the term "concerted" and that the judgment of the Court of Appeal should be affirmed. Petitioners further suggest that due to the limitation of time in applying for this rehearing the matter has not been adequately covered in this Petition for Rehearing. However, Petitioners submit that the authorities and arguments set forth above are ample to illustrate to the Court the importance of the meaning of the term "concerted" in the field of labor law, and that before disposing of this case by deciding the meaning of the aforesaid term, the Court should have the benefit of briefs and argument by Counsel for both Petitioners and the National Labor Relations Board.

Respectfully submitted,

BALDWIN, HASPEL & MOLONY;
LAWRENCE A. MOLONY,
CONRAD MEYER, III.

KAUFMAN, ANDERSON &
LEITHEAD;
ELIAS R. KAUFMAN.

MONROE & LEMANN;
NICHOLAS CALLAN.

New Orleans, La.
June 16, 1951.

CERTIFICATE

The undersigned certifies that a copy of this Petition has been served on opposing Counsel by depositing a copy in the United States mails addressed to:

Hon. Philip B. Perlman, Solicitor General,
Department of Justice,
Washington, D. C.; and

Hon. George J. Bott, General Counsel,
National Labor Relations Board,
Washington, D. C.

The undersigned further certifies that this Petition for Rehearing is filed in good faith and not for the purpose of delay. The undersigned further certifies that the Petition is restricted to the matters mentioned herein.